No. 21567

In the
United States Court of Appeal
For the Ninth Circuit

ELDON O. HALDANE,
Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N. FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON, WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,
Appellees.

Appellees Reply Brief

APPELLEES TOMLIN AND MATTHEWS' JOINT BRIEF

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APPELLEES TOMLIN AND MATTHEWS' JOINT BRIEF

Appellees Tomlin and Matthews, jointly, but for themselves alone and for no other appellee, respectfully file this brief in answer to appellant's Opening Brief and in support of the judgment of the District Court dismissing appellant's action on the ground that it fails to state a claim upon which relief can be granted against these and the other appellees.

Appellant's Complaint in this cause was brought under the Federal Civil Rights Act (42 U.S.C.A. 1983)

for alleged deprivation of his civil rights in relation to certain psychiatric court procedings conducted by the Superior Court of Los Angeles County, California.

The Judgment of Dismissal entered by the District Court in favor of appellees Tomlin and Matthews, was correct and proper and can be sustained on at least the following grounds.

1. Res judicata as to appellee Tomlin.

2. Barred by the applicable three year statute of limitations as to appellee Tomlin.

3. Under the principle of stare decisis as to appellees Tomlin and Matthews.

4. On the ground of judicial immunity as to appellee Matthews.

5. On the ground that the matter has been heard and decided in the State Court.

On the foregoing grounds hereinafter thoroughly detailed under "Discussion," appellees Tomlin and Matthews respectfully urge that the District Court has properly dismissed the Complaint at bar in respect to them and that the judgment of Dismissal entered in their favor herein should be affirmed.

DISCUSSION

I

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE TOMLIN UNDER THE DOCTRINE OF RES JUDICATA.

Since the Complaint herein is the same or very similar to the Complaint in *Haldane v. Chagnon,* et al., 345 F. 2d 601, and relates to the same cause of action as against appellee Tomlin, the District Court action in dismissing the within Complaint and entering a judgment in favor of Tomlin, can be sustained on that ground.

On March 5, 1964, appellant herein commenced an action in the United States District Court, Southern District of California, Central Division, being case number 64-293-CC. In said action, appellant named Wilfred H. Tomlin as one of the defendants, who is the same individual named as a defendant in this cause.

By examiniing the 1964 Complaint and exhibits along with the current Complaint and exhibits at bar, it can be seen that appellant's claim is based on the same set of facts. The 1964 Complaint and the current one both allege that appellant was deprived of his civil rights by reason of the very same psychiatric court proceedings. With respect to defendant Tomlin, appellant alleges in both Complaints that Tomlin signed the Petition of Mental Illness.

On May 12, 1964, the District Court dismissed the action as to all the defendants, including defendant Wilfred H. Tomlin. On May 21, 1964, appellant gave notice of appeal from this prior judgment of dismissal and on May 5, 1965 the Ninth Circuit in *Haldane v. Chagnon,* et al., 345 F. 2d 601, affirmed the dismissal in respect to Tomlin and the other named defendants. As to defendant Tomlin, the Ninth Circuit stated at page 604:

> "The defendant bailiff acted at the direction of the judge to whom he was immediately and directly responsible. In so doing, he was a part of the body of the court itself. In *Hoffman v. Halden, supra,* we held that a jailer or keeper was not liable under the Civil Rights Act for 'performing a duty which the law at that time required him to perform.' A court's bailiff is required by law to preserve order in the courtroom, to protect the court, and to comply with directions given him by the judge during the course of judicial proceedings. It is alleged that the defendant bailiff here, in signing the petition which alleged the bailiff's belief that appellant was in need of medical care, did so at the express direction of the judge whose arm and agent he then was. In the light of our decision that there can be no valid claim against the judge, the bailiff is entitled to the protection of the judicial immunity which surrounded the whole court."

Since the appellant has made the same allegations against appellee Tomlin in the 1964 and the current Complaint, since appellee Tomlin was named as defendant in both Complaints, since both Complaints were based on the same set of facts and asked for substantially the same relief, the case of *Haldane v. Chagnon,* et al., 345 F. 2d 601, decided by the Ninth Circuit, should be res judicata as to appellee Tomlin and the dismissal of appellant's Complaint as to Tomlin can be based on that ground.

In *Rhodes v. Houston,* 202 F. Supp. 624, the plaintiff had brought an action under the Civil Rights Act in which he named certain defendants. The District Court dismissed the Complaint as to all the defendants. The District Court dismissal was affirmed in *Rhodes v. Houston,* 309 F. 2d 959 (8th Circuit 1962).

Subsequently, the same plaintiff brought a new action under the Civil Rights Act in the same District Court and named many of the same defendants who had already recovered a favorable judgment of dismissal in a prior action (although this later Complaint also named other new defendants).

The District Court dismissed this second action in favor of all defendants who had prevailed in the prior judgment with reliance on the doctrine of res judicata (and likewise dismissed in favor of all the newly named defendants under the principle of stare decisis).

On appeal from the second and subsequent dismis-

sal, the Eight Circuit affirmed in *Rhodes v. Meyer,* 334 F. 2d 709 (8th Circuit 1964) and said at pages 712, 713 and 716:

> "The defendants in Meyer and Van Steenberg who were also defendants in Houston asserted the defense of res judicata in their various motions to dismiss and such defense is maintained in these appeals. After a thorough, and we believe accurate, examination and comparison of each of the actions below with Houston, Judge Delehant [the District Court judge] concluded:
>
> "'[T]his court would be on solid ground if it were to regard *Rhodes v. Houston* * * * as dispostive adversely to the plaintiff herein, and in favor of all of the defendants hereto except [those who were not prior defendants and the Justices of the Supreme Court of Nebraska who, although prior defendants, were not previously charged as liable in damages] upon all of the plaintiff's claim herein, insofar as it rests upon facts that existed when the ruling in *Rhodes v. Houston* * * * was made." 225 F. Supp. 80, 106, Cf. 225 F. Supp. 113, 128.
>
> "The doctrine of res judicata is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. Thus, without desiring to be repetitive of the extreme detail in which the district court examined the pleadings, this court shall reexamine them to the extent necessary to determine if either res judicata or stare decisis applies thereto.

"This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:

" ' "The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 * * *" ' *Englehardt v. Bell & Howell Co.*, 8 Cir., 327 F.2d 30, 32.* * *

"The cases we are considering, and Houston allege similar conspiracies under the same Civil Rights Act. * * *

"This court reiterated the applicable rule of res judicata in *Englehardt:*

" 'The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided.' 327 F.2d 30, 32.

"Judge Delehant correctly determined that the causes of action here asserted are the same as asserted in Houston and that the added facts here pleaded do not make this a different cause of action. The basic wrong for which redress is asked is a conspiracy resulting in plaintiff's alleged wrongful conviction and imprisonment. * * *

"Plaintiff argues on appeal as he did below that res judicata cannot apply in these cases because the decision in *Houston* was not on the merits but merely a motion to dismiss. The authoritier cited by Judge Delehant at 225 F. Supp. 80, 105, adequately dispose of this argument and they establish that judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of res judicata in a subsequent action. Judge Sanborn in *Sylvan Beach, Inc. v. Koch,* 8 Cir., 140 F.2d 852, 860, quoted from Freeman on Judgments, 5th Ed., Vol. 2 §740 where it was stated that 'A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings.' See *Florasynth Laboratories v. Goldberg,* 7 Cir., 191 F.2d 877; 2 Moore's Federal Practice Para. 12.14 at 2267. The decisions on immunity of the various defendants in *Houston* were on the merits and thus precluded redetermination in these cases as to the immunity of these prior defendants: to wit [naming all defendants who were made parties in the prior litigation]"

As can be seen from the quoted portions of the *Rhodes* case, that decision expressly holds that the fact that some new parties defendant have been added to a subsequent action (who had not been named in a prior action which had proceeded to judgment) does not prevent the doctrine of res judicata in favor of those parties who had been named in both the prior

and subsequent actions. This rule totally answers appellant's argument made in Opening Brief page five, without the support of any case authority whatsoever that the principle of res judicata is not applicable in favor of appellee Tomlin.

Contrary to appellant's argument, the *Rhodes* case expressly holds that the rule of res judicata is specifically applicable to bar the new action against the parties charged in both causes and it is only those parties who were merely named in a subsequent action who can not invoke the doctrine of res judicata.

II

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE TOMLIN ON THE GROUND THAT IT IS BARRED BY THE APPLICABLE THREE YEAR STATUTE OF LIMITATION.

The Complaint shows that the only overt act committed by Tomlin was the signing of the Petition of Mental Illness on May 8, 1961. The Complaint in this action was filed on January 24, 1966. Since well over four years had elapsed from the date of the alleged act, to the date of the filing of the Complaint, any action against appellee Tomlin is barred by the applicable statute of limitations.

California Code of Civil Procedure, Section 338(1) provides that an action other than for the recovery of real property, must be commenced within three years if

there is an action upon a liability created by statute other than a penalty of forfeiture.

It is settled law that in respect to any action brought on the ground of deprivation of civil rights in a federal district court having its situs in California, the statute of limitations is three years in that this limitations period commences to run in respect to any particular defendant from the date of the last overt act attributed to that defendant.

In *Lambert v. Conrad,* 308 F. 2d 571 (9th Circuit 1962) a complaint brought under the Civil Rights Act was dismissed by the District Court of the Southern District of California, Central Division, as barred by the statute of limitations. On Appeal, the Ninth Circuit affirmed and said at page 571:

> "This appeal is from an order dismissing an action as barred by the statute of limitations. The complaint alleges a civil conspiracy under the Civil Rights Act. 42 U.S.C.A. §§ 1983, 1985. The applicable period of limitation is three years. California Code of Civil Procedure, §338(1); *Smith v. Cremins,* 9 Cir. 308 F. 2d 187. The last possible date from which the period could have commenced to run was that of 'the last overt act alleged from which damage could have flowed * * *.'"

In *Smith v. Cremins,* 308 F. 2d 187 (9th Circuit 1962) cited in *Lambert,* the Ninth Circuit determined that:

"Since the Civil Rights Act contains no provision limiting the time within which an action may be brought under Section 1983, the applicable period of limitation is that provided by the statutes of California — the state in which the present action arose and the District Court was located. The court decided that the California three year limitation statute, Code of Civil Procedure Section 338(1) which related to the actions based 'upon a liability created by statute' was the pertinent limitations provision.

III

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEES TOMLIN AND MATTHEWS UNDER THE PRINCIPLE OF STARE DECISIS.

In 21 C.J.S. Courts, Sec. 197, pp. 343-345, it is said:

"Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. . . ." [then follow literally a hundred citations to U.S. Supreme Court and Federal Court decisions].

In *Rhodes v. Meyer,* 334 F. 2d 709, referred in this brief under Section II, it was held that the doctrine of res judicata was applicable in favor of those parties who had been defendants in a prior cause and had recovered judgment therein and who were thereafter

named in a new and similar action. *Rhodes* further holds, that where, as occurred therein and at bar, there has also been an appeal from the earlier judgment, and an affirmation thereof by a court of last resort, the principle of stare decisis will also serve to exonerate from liability (in any later action brought on the same cause of action) all parties defendant who, as appellees in the earlier action, had received the benefit of the appellate court's decision. Moreover, *Rhodes* also holds that the same rule of stare decisis will even exonerate from liability those defendants who were only named as parties in the latter action, alone. In these respects the opinion says, at pages 716, 717:

> "The trial court held that all defendants in the two actions before us, including those who were defendants in Houston and those who were not, were entitled to have their motions to dismiss sustained upon the basis of stare decisis, stating in support thereof:
>
> "'But after thorough study of the present file, and of the facutal history to which it directs the court, supra, it has been, and is, considered unnecessary to premise the present ruling either upon the doctrine of res judicata, or upon its related rule of estoppel by judgment, and more appropriate to poise it upon the application of the principle of stare decisis. . . .'"

Thus the *Haldane v. Chagnon,* et al., 345 F. 2d 601, decision can be used to invoke the doctrine of stare decisis in favor of dismissal of the current Complaint.

Under the principle of stare decisis, the *Haldane* decision which dismissed the 1964 Complaint is binding on the District Court and this circumstance dictates that the current Complaint (which is based on the same cause of action) must likewise be dismissed.

IV

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED AS TO APPELLEE MATTHEWS ON THE GROUND OF JUDICIAL IMMUNITY.

The Complaint shows that appellee Albert D. Matthews acted at all times mentioned therein within the scope of his official duties as a Court Commissioner of the Superior Court of Los Angeles County or as Judge Pro Tem of that court, and is a judicial or quasi judicial officer and thereby immune from suit under U.S.C.A. Title 42, Section 1985(3). In *Agnew v. Moody,* 330 F. 2d 868 (9th Circuit 1964) the plaintiff brought an action under the Civil Rights Act against the judge of the Municipal Court and other defendants, in connection with plaintiff's conviction on a traffic ticket. Plaintiff's action was dismissed in the District Court and affirmed in the Ninth Circuit.

On page 869, the court said:

> "We have repeatedly held that judges and quasi judicial officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act, for conduct in the performance of

> their official duties. See, e.g., *Harmon v. Superior Ct.,* 329 F. 2d 154 (9th Cir. 1964; *Sires v. Cole,* 320 F. 2d 877 (9th Cir. 1963)."

In *Haldane v. Chagnon,* et al., 345 F. 2d 601 (9th Circuit 1965) discussed earlier, the court at page 603 said:

> "Judges are immune from civil liability for acts done in the course of their official functions and we have held that the doctrine so firmly and deeply implanted in the field of Anglo-American law, is operative in actions grounded upon the Civil Rights Act. *Sires v. Cole,* 320 F. 2d 877 (9th Circuit 1963), *Harmon v. Sup. Court of State of California,* 329 F. 2d 154, (9th Circuit 1964), *Agnew v. Moody,* 330 F. 2d 868 (9th Circuit 1964); *Harvey v. Sadler,* 331 F. 2d 387 (9th Circuit 1964)."

A recent United States Supreme Court case, *Pierson v. Ray,* C.C.H. United States Supreme Court Bulletin, page B1401, filed April 11, 1967, has upheld the doctrine of judicial immunity. In that case, petitioners brought an action against police officers and judges under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983. The acion against the judge, a municipal police justice, was brought because the judge convicted the petitioners under a state statute.

The Supreme Court stated:

"We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions . . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction as this court recognized when it adopted the doctrine in *Bradley v. Fisher,* 13 Wall. (80 U.S.) 335 (1871) * * *.

"We do not believe that this settled principle of law was abolished by Section 1983 which makes liable 'any person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities. Accordingly, this Court held in *Tenney v. Brandhove,* 341 U.S. 367 (1951) that the immuity of legislators for acts within the legislative rule was not abolished. The immunity of judges for acts within the judicial rule is equally well established and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

V

THE DISMISSAL OF THIS CAUSE CAN BE SUSTAINED ON THE GROUND THAT THE MATTER HAS ALREADY BEEN HEARD AND DECIDED IN THE STATE COURT.

An action was brought by appellant herein in the Superior Court of Los Angeles County, California in Case No. 790,809 in March of 1962 against appellee Tomlin and other defendants for false imprisonment and malicious prosecution.

The action against Tomlin was based on the same set of facts as the present Complaint and charged Tomlin with preparing and swearing to a false petition for mental illness. Summary judgment was entered by the court in favor of Tomlin on April 8, 1966 on the statutory grounds that the action had no merit and that there was no triable issue of facts. Appellant herein did not appeal this judgment.

Thus, the appellant has tried his case in the State Court where summary judgment was given in favor of the appellee. Appellant then brought an action in the Federal District Court on the same set of facts where his Complaint was dismissed. Appellant then appealed to the Ninth Circuit where the District Court dismissal was affirmed. Appellant then brought a second action based on the same set of facts in the same Federal District Court. Again his Complaint was dismissed and now again he is appealing to the same Ninth Circuit. It would appear that appellant desires

to relitigate this matter ad nauseam and in fairness to the courts and litigants this matter should be laid to rest by this honorable court once and for all and the District Court order of dismissal should be affirmed.

In *Kenney v. Fox,* 132 F. Supp. 305, the plaintiff was committed to a state hospital in Michigan by a probate judge. Later, the plaintiff had the decree committing him to the state hospital declared null and void. The plaintiff then commenced a civil action in the state courts against the medical superintendent and other employees of the hospital alleging false imprisonment, abuse and improper treatment among other things. One of the defendant doctors filed a Motion to Dismiss which was granted by Judge Fox. The plaintiff then filed a Complaint against Judge Fox in the Federal District Court alleging that Judge Fox denied plaintiff due process and equal protection of the law and violated plaintiff's constitutional rights under the Fourteenth Amendment of the United States Constitution by dismissing the State Court action. The Federal District Court granted Judge Fox' motion to dismiss the action.

On Page 314, the Federal District Court stated:

> "The decision by Judge Fox dismissing plaintiff Kenney's civil action against Dr. Morter and others in the Kalamazoo circuit court stands correct and as the law of that case until reversed by an appellate or higher court. If plaintiff Kenney was dissatisfied with that decision and considered

it to be erroneous, his available and proper remedy was by appeal to the Supreme Court of Michigan. If aggrieved by the decision of the Michigan Supreme Court on appeal, he could then assert his claims of violation of his constitutional and civil rights in a petition to the Supreme Court of the United States for writ of certiorari to review the decision of the Michigan court.

"Instead of pursuing his available and proper remedy by appeal to the Michigan Supreme Court, plaintiff Kenney began the present action for money damages against Judge Fox in this federal court, and he seeks to establish federal court jurisdiction by alleging as generalities and conclusions, without specification of supporting facts, that Judge Fox' decision in the state court case was erroneous and deprived him of his constitutional and civil rights.

"To hold with plaintiff Kenney's contentions in the present case would, in effect, mean that any litigant dissatisfied with a state court decision could relitigate his dispute in a federal court merely by alleging as a conclusion that he had been deprived of his constitutional and civil rights."

CONCLUSION

For the foregoing reasons, appellees Tomlin and Matthews respectfully urge that the District Court properly dismissed the Complaint in respect to them and that the judgment of dismissal entered in their favor should be affirmed.

Respectfully submitted,

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County Counsel

and

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Tomlin and Matthews.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH J. SCALZO